No. 80-924

# In the Supreme Court of the United States

OCTOBER TERM, 1980

SHELL OIL COMPANY, ET AL., PETITIONERS

*v.*

DEPARTMENT OF ENERGY, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

**BRIEF FOR THE RESPONDENTS IN OPPOSITION**

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## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the Energy Information Administration's requirement that energy-producing companies submit financial reports is authorized by law.

2. Whether the Energy Information Administration has authority to cooperate with antitrust enforcement agencies in developing and utilizing its financial reporting system.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 631 F. 2d 231. The opinion of the district court (Pet. App. B) is reported at 477 F. Supp. 413.

## JURISDICTION

The judgment of the court of appeals (Pet. App. C) was entered on September 8, 1980. The petition for a writ of certiorari was filed on Monday, December 8, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTES INVOLVED

Section 12(f) of the Federal Energy Administration Act of 1974, 15 U.S.C. 771(f), provides in pertinent part:

> * * * The Comptroller General may not disclose to the public any information which concerns or relates to a trade secret or other matter referred to in section 1905 of Title 18, except that such information shall be disclosed by the Comptroller General or the Administrator [of the Federal Energy Administration], in a manner designed to preserve its confidentiality—
>
> > (1) to other Federal Government departments, agencies, and officials for official use upon request[.]

Section 52(a) of the Federal Energy Administration Act of 1974, 15 U.S.C. (Supp. III) 790a(a), provides in pertinent part:

> It shall be the duty of the Director [now the Administrator of the Federal Energy Administration] to establish a National Energy Information System * * *. The System shall contain such information as is required to provide a description of and facilitate analysis of energy supply and consumption within and

affecting the United States on the basis of such geographic areas and economic sectors as may be appropriate to meet adequately the needs of—

* * * * *

(3) such other officers and employees of the United States in whom have been vested, or to whom have been delegated energy-related policy decisionmaking responsibilities[.]

Section 205(h)(2) of the Department of Energy Organization Act, 42 U.S.C. (Supp. III) 7135(h)(2), provides in pertinent part:

The Administrator [of the Energy Information Administration] shall develop and make effective * * * the format for an energy-producing company financial report. The report shall be designed to allow comparison on a uniform and standardized basis among energy-producing companies and shall permit for the energy-related activities of such companies—

* * * * *

(B) an analysis of the competitive structure of sectors and functional groupings within the energy industry[.]

Section 102(12) of the Department of Energy Organization Act, 42 U.S.C. (Supp. III) 7112(12), provides in pertinent part:

The Congress * * * declares that the establishment of a Department of Energy is in the public interest and will promote the general welfare by assuring coordinated and effective administration of Federal energy policy and programs. It is the purpose of this chapter—

* * * * *

(12) to foster and assure competition among parties engaged in the supply of energy and fuels[.]

## STATEMENT

Petitioners Shell Oil Company and seven other major energy companies brought this action against the Department of Energy and its component agency, the Energy Information Administration (EIA), seeking a declaration that EIA's annual financial reporting requirement (Form EIA-28) for 27 major energy-producing companies is unlawful. Petitioners alternatively sought an order enjoining the EIA and Department of Energy from releasing any proprietary financial information reported on Form EIA-28 to any other governmental agency. The district court and court of appeals denied petitioners the relief they sought, concluding that the Financial Reporting System and Form EIA-28 were lawfully developed and promulgated and that the EIA and Department of Energy had authority to release information reported on Form EIA-28 to other agencies of the government, including the Department of Justice and the Federal Trade Commission.

1. The Financial Reporting System (FRS) challenged in this litigation is a system for collection, analysis and dissemination of financial and operational data concerning the energy-production industry. Pet. App. B-2; 43 Fed. Reg. 27056 (1978). The reporting form (Form EIA-28) requires disclosure of each reporting company's total revenues, expenditures, profits, investments, and general financial operations. Certain information also must be disclosed concerning the types of energy produced (*e.g.*, petroleum, coal, nuclear) and the types of activity involved (*e.g.*, production, refining and marketing). 44 Fed. Reg. 2759 (1979). The objectives of the FRS are set forth in Section 205(h) of the Department of Energy Organization Act (DOE Act), 42

U.S.C. (Supp. III) 7135(h).[1] Pursuant to this broad statutory directive, the FRS was designed to collect data useful in the evaluation and analysis of the interrelated policy issues of "competition," "energy supply development," and "the impact of governmental actions on the energy sector." 43 Fed. Reg. 27056 (1978). These matters were considered by EIA to be "major energy policy concerns" that could be addressed through analysis of the data provided by the FRS (C.A. App. 1565, 1565-1568).[2]

2. The background of the FRS sheds additional light on its intended scope. The FRS was originally conceived following enactment of the Federal Energy Administration Act of 1974 (FEA Act). That Act authorized the FEA Administrator to require financial reports from energy-

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[1]Section 205(h)(2) of the DOE Act, 42 U.S.C. (Supp. III) 7135(h)(2), directs the EIA Administrator to develop

> an energy-producing company financial report. Such report shall be designed to allow comparison on a uniform and standardized basis among energy-producing companies and shall permit for the energy-related activities of such companies—
>
> (A) an evaluation of company revenues, profits, cash flow, and investments in total, for the energy-related lines of commerce in which such company is engaged and for all significant energy-related functions within such company;
>
> (B) an analysis of the competitive structure of sectors and functional groupings within the energy industry;
>
> (C) the segregation of energy information, including financial information, describing company operations by energy source and geographic area;
>
> (D) the determination of costs associated with exploration, development, production, processing, transportation, and marketing and other significant energy-related functions within such company; and
>
> (E) such other analyses or evaluations as the Administrator finds is necessary to achieve the purposes of this chapter.

[2]"C.A. App." refers to the appendix in the court of appeals.

producing companies. Section 13 of the Act, 15 U.S.C. 772. Preliminary work was commenced in 1975 in an effort to develop an effective reporting system. 40 Fed. Reg. 43612 (1975). The scope of the information system was clarified by an August 1976 amendment to the FEA Act, which required the FEA to establish a "National Energy Information System" containing energy information appropriate "to meet adequately the needs" of FEA, Congress, and "other officers and employees of the United States" having "energy-related policy decisionmaking responsibilities." Section 52(a) of the Act, 15 U.S.C. 790a(a).

In connection with his April 20, 1977, address to Congress announcing his national energy plan, the President stated that his administration would implement the National Energy Information System by developing comprehensive and accurate energy information needed to serve the public interest in the energy field. 13 Weekly Comp. of Pres. Doc. 566, 576-577 (Apr. 25, 1977). The President advised that, in times of increasing scarcity, "competition among energy producers" must be guaranteed. *Id.* at 572. He added that his administration would utilize the National Energy Information System to assure "[s]trict enforcement of the antitrust laws." *Ibid.*

Meanwhile, the administration's bill to establish the Department of Energy (S. 826, 95th Cong., 1st Sess.) had been introduced on March 1, 1977. 123 Cong. Rec. 5666 (1977). In the course of committee hearings on that bill, a provision was added requiring the Department of Energy's proposed Energy Information Administration to develop a comprehensive system of mandatory financial reporting by major energy firms. See 123 Cong. Rec. 15270 (1977). The sponsor of the bill, Senator Ribicoff, stated on the Senate floor: "The provision is consistent with the President's concerns expressed in his April 20, National Energy Plan." *Id.* at 15276.[3] That provision became Section 205(h) of the

[3]See also S. Rep. No. 95-164, 95th Cong., 1st Sess. 51 (1977).

DOE Act (see note 1, *supra*). The DOE Act also vested in the EIA Administrator the responsibility for developing "a central, comprehensive, and unified" energy data base for the federal government. Section 205(a)(2), 42 U.S.C. (Supp. III) 7135(a)(2). The current format of the FRS was the result of approximately one year of intense review and development by the EIA between October 1977 and June 1978.

3. Consistent with Section 52 of the FEA Act[4] the energy agency (initially the Federal Energy Administration and later the EIA) invited various other agencies of the government to provide their comments and suggestions concerning the FRS. Two such agencies were the Department of Justice and the Federal Trade Commission.

Most of the specific suggestions made by the Department of Justice and Federal Trade Commission concerned the need for greater factual detail in the FRS. EIA gave careful consideration to all suggestions, reviewing in each case the question whether the particular suggestion would meet the overall purposes of the FRS, whether it was feasible, whether the information in question already was available elsewhere, and whether undue burdens would be placed on reporting companies. It accepted certain suggestions tendered by the antitrust enforcement agencies and rejected others. The system, as finally implemented, was intended to (C.A. App. 422):

> serve a useful purpose by broadly delineating the structure of the industry and by discerning significant changes in market structure and performance. For

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[4]As previously noted, Section 52(a) of the FEA Act requires the development of a National Energy Information System appropriate "to meet adequately the needs" of the energy agency, Congress, and "other officers and employees of the United States" having "energy-related policy decisionmaking responsibilities." 15 U.S.C. (Supp. III) 790a(a).

> antitrust purposes, FRS is most effective as an early warning system making possible a broad first level surveillance for indications of potentially anticompetitive directions.

Thus, while the Justice Department and FTC strongly urged the adoption of their various suggestions, "EIA made the ultimate decisions regarding the design and content of the report form" (Pet. App. B-19).[5]

In conjunction with its promulgation of Form EIA-28, EIA issued a statement of guidelines to be used in making EIA-28 data available to the Department of Justice, the FTC, the Department of the Interior, and the General Accounting Office, when such information is needed by those agencies to carry out their "lawful duties and responsibilities." See 44 Fed. Reg. 2760 (1979).

4. Petitioners filed this suit in March 1979 in the United States District Court for the District of Delaware. They challenged the participation by the Department of Justice and the Federal Trade Commission in EIA's development of Form EIA-28 and EIA's decision to share company-specific EIA-28 data with the Department of Justice and FTC. Both sides moved for summary judgment.

The district court upheld the legality of Form EIA-28 in all respects (Pet. App. B). The court acknowledged that

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[5]There is no evidence in the record suggesting that the EIA turned over its responsibilities for the design of the financial report to the antitrust agencies or that that design was dictated by those agencies. All information required by Form EIA-28 is needed by EIA to fulfill its responsibilities for information gathering and analysis under Section 205(h) of the DOE Act, regardless of whether the information also serves needs of the antitrust agencies. In the district court, petitioners identified no "particular data-element requests" on Form EIA-28 that were objectionable (Pet. App. B-18) and "failed to point out any specific inquiry of EIA-28 which is not designed to elicit information having value for energy policy planning purposes" (Pet. App. A-6; see also Pet. App. B-20).

officials of the Department of Justice and FTC had participated in the development of the form by making suggestions to EIA for modification of the form; that the purpose of those suggestions was to "obtain information relevant to the antitrust responsibilities of the DOJ and the FTC"; that some of the suggestions of these agencies were incorporated into the final form; and that Form EIA-28, as finally adopted, requires information about petitioners "which would be relevant to an analysis of whether there are or are not antitrust violations in various lines of commerce in the energy industry" (Pet. App. B-19). The court held, however, that "EIA made the ultimate decisions regarding the design and content of the report form and declined to adopt a number of suggestions vigorously pressed by the DOJ and FTC" (*ibid.*).

The court also held that the EIA has statutory authority to collect all of the data sought by Form EIA-28, including "information relevant to the presence or absence of competition in the energy industry." The court cited Section 205(h) of the DOE Act in reaching that conclusion (Pet. App. B-22). The court observed that "Congress intended that the EIA would collect data for the benefit of the FTC and the DOJ and, accordingly, * * * there is nothing improper about its intending to do so" (*id.* at B-23). In rejecting petitioners' contention that consultation by the EIA with the Department of Justice and FTC was unlawful, the court stated that Congress has "expressly authorize[d] these three agencies to confer concerning their information needs" (*ibid.*). Finally, the district court ruled that disclosure of information collected by the EIA to the Department of Justice and FTC to carry out their statutory responsibilities was in all respects lawful (*id.* at B-33 to B-44).

The court of appeals affirmed (Pet. App. A). The court pointed out that (Pet. App. A-5 to A-6):

> [s]ince the statute itself [the DOE Act] shows that Congress saw a nexus between energy policy planning

> and competition, we cannot find that information which is sought because it may be relevant to antitrust policy and enforcement is, *ipso facto*, sought for an improper purpose.

In reaching that conclusion, the court relied on Sections 102(12) and 205(h) of the DOE Act, 42 U.S.C. (Supp. III) 7112(12) and 7135(h), and Sections 12(f) and 52(a) of the FEA Act, 15 U.S.C. 771(f) and (Supp. III) 790a(a) (see pages 1-2, *supra*). In sum, the court found "no basis to interfere with the agency's fulfillment of its statutory obligations to collect data" and no impropriety in its decision to disseminate information to the Department of Justice and FTC for antitrust evaluation (Pet. App. A-5 to A-7).

## ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court. Other than the courts below, no court has ruled on the question whether EIA's financial reporting requirement is authorized by law. And no other court has addressed the question whether the particular statutes here involved contemplate cooperation between the Department of Energy and the antitrust enforcement agencies in developing and utilizing the energy information base. We are aware of no pending or impending litigation in the lower federal courts that would be affected by a ruling by this Court on these issues. Review by this Court at this time therefore is unwarranted.

1. Petitioners argue (Pet. 9) that review by this Court is warranted because of the "enormous increase" in the investigative powers of the antitrust enforcement agencies created by the judgment below. In support of this argument, petitioners contrast the information-gathering powers of the Department of Justice and FTC, which are limited to specific investigations or proceedings, with the annual financial reporting system of the Energy Information Adminis-

tration, which extends to the "competitive structure" of the energy-producing industry. 42 U.S.C. (Supp. III) 7135(h)(2)(B). There is no merit to this contention.

The subpoena powers of the Department of Justice and the FTC are prescribed in the Antitrust Civil Process Act and the Federal Trade Commission Act (15 U.S.C. 1312; 15 U.S.C. 46, 49). These provisions authorize the antitrust enforcement agencies to obtain directly from private parties information relevant to their enforcement responsibilities. These investigative powers extend to all lines of commerce and are not limited to energy production companies. Neither of these statutes purports to limit the Department of Justice or the FTC in their cooperative interaction with other government agencies, which often acquire information relevant to the enforcement of the antitrust laws.

Petitioners nevertheless argue (Pet. 12) that the DOE Act "nowhere mentions any responsibility [imposed on EIA] of cooperating or coordinating with the Department of Justice or the FTC with respect to antitrust." But Section 52 of the FEA Act (which is incorporated in the DOE Act),[6] creates just such a responsibility through its mandate to the EIA to develop a "National Energy Information System" containing energy information appropriate to meet the needs of "other officers and employees of the United States in whom have been vested * * * energy-related policy decisionmaking responsibilities." 15 U.S.C. (Supp. III) 790a(a)(3).[7] See also Section 56(b)(1) of the FEA Act, 15 U.S.C. 790e(b)(1) (coordination respecting energy information needs of other agencies). As the district court and court of appeals correctly concluded (Pet. App. A-6 to A-7, B-41 to B-42), the Department of Justice and FTC clearly have "energy-related policy decisionmaking responsibilities," because

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[6]See Section 205(c), 42 U.S.C. (Supp. III) 7135(c).

[7]Petitioners fail to discuss or even cite this statute in their petition.

they are charged with economic analysis and decisionmaking regarding competition and antitrust enforcement in the energy-production industry. Under the DOE Act, moreover, assurance of competition in the energy-producing industry is expressly stated to be one of the basic goals of national energy policy (42 U.S.C. (Supp. III) 7112(12)). And analysis of the "competitive structure" of the energy-producing industry is an expressly stated objective of the financial reporting system mandated by the Act (see 42 U.S.C. (Supp. III) 7135(h)(2)(B)). In view of these provisions of the energy statutes, and their legislative history,[8] there can be no doubt that Congress affirmatively "intended FRS data to be utilized in ascertaining the presence or absence of competition in the energy industry and the use of FRS authority to collect data for that purpose is not a misuse or abuse of that authority" (Pet. App. B-20).[9]

Although petitioners "do not argue * * * that DOE has been give[n] unconstitutional powers" (Pet. 15), they do suggest that EIA's annual reporting requirements may raise constitutional questions, apparently because the reports do not pertain to a specific investigation or proceeding (Pet. 15-16). This assertion also is insubstantial. Nearly all highly regulated industries are subject to periodic inspection or reporting requirements. No judicial authority cited by petitioners suggests that such requirements, when rationally related to a legitimate governmental objective, are unconstitutional. See *Shapiro* v. *United States*, 335 U.S. 1, 32

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[8]See pages 4-5, *supra*.

[9]As the district court explained, under the federal energy statutes "no meaningful dichotomy can be drawn between energy planning data and information concerning the presence or absence of competition in the energy industry" (Pet. App. B-20; see also *id.* at A-5).

(1948); *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652 (1950); *United States* v. *Biswell*, 406 U.S. 311, 316-317 (1972).[10]

2. Because Congress has expressly authorized the EIA to collect financial data to facilitate analysis by other agencies of competition in the energy industry, this Court's decision in *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978), is inapposite. In *LaSalle*, this Court reversed a decision of the court of appeals that had refused to enforce an IRS summons because the sole motivation of the individual agent conducting the case was to gather evidence for a criminal prosecution. The Court held that the statutory prohibition against use of an IRS summons following a recommendation for criminal enforcement should apply only after IRS has determined institutionally to recommend criminal prosecution.[11] The decision involved only the construction of IRS statutes. 437 U.S. at 307-313. The rule recognized in *LaSalle*—that it is improper to use an IRS summons for criminal investigation following a recommendation for criminal prosecution—is irrelevant in the present case not only because this case arises under a wholly separate statutory scheme, but also because there is no suggestion that the EIA is collecting information solely for the purpose of commencing a criminal prosecution.

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[10]Although petitioners suggest (Pet. 16) that requiring this information is equivalent to " 'indiscriminate rummaging among [their] records,' " they wholly fail to demonstrate that the required information is unrelated to the objectives of Congress in creating a national energy production data bank.

[11]An IRS summons is not properly employed following a recommendation for criminal prosecution because, at that stage, the Department of Justice has sole responsibility for the case in both its civil and criminal aspects. See *Donaldson* v. *United States*, 400 U.S. 517, 535-536 (1971).

More fundamentally, there is no basis for the assertion that the EIA acts with an "improper purpose" (Pet. 17) when it collects information bearing on competition in the energy production industry. In contrast to *LaSalle*, there is no doubt here that Congress intended the EIA to gather such information and to share it with responsible government agencies having a decisionmaking role in relation to the energy industry. Thus, even if the "improper purpose" doctrine of *LaSalle* extends beyond criminal tax cases, petitioners here have made no showing of improper use of investigative powers.[12]

3. Petitioners also argue (Pet. 19) that the lower courts have differed concerning the application of *LaSalle* in various statutory contexts. They contend that the D.C. Circuit's decision in *SEC* v. *Dresser Industries, Inc.*, 628 F. 2d 1368 (1980) (en banc), cert. denied, No. 80-354 (Nov. 17, 1980), conflicts with the decision of the Third Circuit here. There is no merit to that assertion. In *Dresser*, the D.C. Circuit concluded that "IRS investigative and enforcement proceedings are not analogous to those of the SEC." 628 F. 2d at 1379. Accordingly, the court ruled that an SEC civil investigation could proceed in tandem with a grand jury investigation and that information collected in the civil investigation could be transmitted to the grand jury. The court's decision rested on a detailed examination of the terms and legislative history of the Securities Act of 1933, 15 U.S.C. 77a *et seq.*, and the Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.* 628 F. 2d at 1379-1380, 1384-1387. In contrast to the situation in *LaSalle*, the court of appeals in

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[12]This Court repeatedly has recognized that the fruits of civil investigations may be shared with the Department of Justice when the civil investigation has an independent basis. See *United States* v. *Kordel*, 397 U.S. 1, 11-13 (1970); *Standard Sanitary Mfg Co.* v. *United States*, 226 U.S. 20, 51-52 (1912).

*Dresser* found that the SEC's authority to issue subpoenas remained undiminished after the start of a grand jury investigation. The decision of the court of appeals in *Dresser*, which examined the relevant statutory provisions and legislative history to determine if Congress intended to preclude inter-agency cooperation, is perfectly consistent with the decision of the court of appeals in this case, which undertook a similar analysis. There is no basis for inferring that the D.C. Circuit would reach a result different from that of the Third Circuit in the present case if it were to review the provisions and legislative history of the Federal Energy Administration Act of 1974 and the Department of Energy Organization Act.[13]

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1981

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[13]Whether the reasoning of *LaSalle* applies in a particular case depends upon the nature of the statutory scheme before the court. No decision cited by petitioners (Pet. 19-20) suggests that any court would reach the conclusion that it is improper for the Department of Energy to cooperate with the Department of Justice and the Federal Trade Commission in implementing the procompetitive goals expressed in the federal energy statutes.